IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941

No. 945

HARTFORD FIRE INSURANCE COMPANY,

*Petitioner,*

*vs.*

MARTIN LEITHAUSER, AS ADMINISTRATOR OF THE ESTATE OF P. J. LEITHAUSER, DECEASED,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Hartford Fire Insurance Company, respectfully represents and shows to the court:

### SUMMARY STATEMENT OF THE CASE

This suit is to reform a policy of fire insurance and to recover a judgment upon the policy as reformed. It was filed in the Common Pleas Court of Defiance County, Ohio, on March 30, 1936 (R. 1), and thereafter duly removed

on the ground of diversity of citizenship, to the United States District Court, for the Northern District of Ohio, Western Division (R. 1).

Upon the trial in the District Court, the only issue considered upon its merits was that of reformation. A chattel mortgage defense set up in petitioner's answer was reserved for future determination (R. 177-79). On August 28, 1939, the district judge handed down a written opinion finding on the issue of reformation for defendant-petitioner and dismissing plaintiff-respondent's petition (R. 92; 29 F. Supp. 401).

The plaintiff-respondent, Leithauser, prosecuted an appeal from this adverse judgment, and the court below reversed the judgment of the District Court and, overlooking or disregarding entirely the fact that the issue of reformation alone had been submitted and tried in the District Court, remanded the case "with directions to decree reformation as indicated and **to render judgment upon the policy as reformed.**"[1] (R. 161.)

Upon the petition for rehearing filed by petitioner (R. 163), the court below altered the language of its opinion so as to remand the cause with directions to decree reformation and for "other proceedings" consistent with its opinion (R. 183).

The controlling facts in this case are not in dispute. These facts are concisely stated in chronological order in the Findings of Fact approved by the District Court (R. 92-95). We adopt these Findings of Fact, without material change, as our statement of the facts.

1. On January 28, 1930, the defendant-petitioner issued to plaintiff-respondent's decedent a policy of fire insurance for a period of one year upon a certain elevator

[1] All forms of emphasis in this petition and in the supporting brief which follows are supplied unless otherwise indicated.

owned by the decedent, located in Sherwood, Defiance County, Ohio (R. 11-23). This policy was a second renewal of a policy issued in January of 1928 (R. 128-133), and renewed in January, 1929 (R. 133-135).

2. At the dates on which these policies were issued, and at the date of the fire on July 20, 1930, the decedent, P. J. Leithauser, was a member of the partnership of Leithauser and Parent, engaged in Sherwood, Ohio, in the business of writing fire insurance. Said firm on the said dates was the duly licensed general agent of the defendant-petitioner for the purpose of writing fire insurance, and the policy in question and its predecessors were issued to the decedent by the said partnership of Leithauser and Parent as the general agent of the defendant-petitioner (R. 103, 114; 78 F. 2d 320).

3. On July 20, 1930, the insured elevator, with the exception of the office building, burned to the ground (R. 122).

4. On March 4, 1931, P. J. Leithauser, as plaintiff, filed his petition in the Common Pleas Court of Defiance County, Ohio, seeking **at law** a judgment on said policy in the sum of $10,000.00, which cause was duly removed to the United States District Court for the Northern District of Ohio, Western Division, and was docketed as Cause No. 3737 at Law.

5. In said law action the defendant-petitioner had pleaded, among others, the defenses that the property stood upon leased ground, and that there was existing at the time of the fire an undisclosed chattel mortgage on the insured property, contrary to policy conditions (R. 93; 78 F. 2d 320).

6. The cause came on for trial on or about June 28, 1933, before a jury, with Judge John M. Killits presiding. At the conclusion of the evidence, the court, without pass-

ing upon the chattel mortgage defense, sustained a motion of the defendant-petitioner for a directed verdict in its favor, on the ground that the property destroyed stood upon leased ground, in violation of a condition of the policy (R. 93, 78 F. 2d 320).

7. From the judgment entered upon this verdict Leithauser appealed to the United States Circuit Court of Appeals, for the Sixth Circuit, which affirmed the judgment of the trial court on June 29, 1935 (78 F. 2d 320; R. 140).

8. Leithauser then filed a motion in the Circuit Court of Appeals to recall the mandate and for leave to amend the petition, setting up a claim for reformation of the policy. This motion was denied by the court on October 8, 1935 (R. 141-142).

9. From the judgment of the United States Circuit Court of Appeals, affirming the judgment of the trial court and denying Leithauser's motion to recall the mandate and for leave to file an amended petition, Leithauser filed a petition for a writ of *certiorari* in the Supreme Court of the United States, which was denied on November 25, 1935 (296 U. S. 645).

10. Thereafter, on or about January 31, 1936, Leithauser in the same cause No. 3737 at Law in the District Court of the United States, for the Northern District of Ohio, Western Division, filed a motion for leave to file an amended petition, setting up a claim for the reformation of the policy. This motion was heard by and submitted to District Judge Paul Jones, who, on May 8, 1936, overruled and denied said motion (R. 94).

11. The present action, a new and separate *suit in equity* to reform the policy by inserting therein language to the effect that the property in question was on land leased by the insured from the Baltimore & Ohio Railroad Company, was filed on March 30, 1936, in the Common Pleas

Court of Defiance County, Ohio. This petition not only sought reformation of the contract, but judgment thereon after reformation in the sum of $10,000.00 and interest. This cause was duly removed by the defendant-petitioner to the District Court (R. 1-11).

12. The policy in question contains the following provision (R. 22):

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

13. The present suit was not brought until almost five years after the time specified in the policy within which suits could be brought. The fire occurred July 20, 1930 (R. 122). This suit was filed on March 30, 1936 (R. 1).

14. On March 22, 1937, P. J. Leithauser died, and this cause was revived upon motion of the administrator, and has since been prosecuted in the name of Martin Leithauser, as administrator of the estate of P. J. Leithauser (R. 122).

## OPINIONS BELOW

The opinion of the Circuit Court of Appeals is found at page 154 of the record, and is reported in 124 F. 2d 117.

The opinion of the District Court may be found in the record at pages 85-92 and is officially reported in 29 F. Supp. 401.

The opinion of the United States Circuit Court of Appeals in the earlier case at law between the same parties is officially reported in 78 F. 2d 320.

*Certiorari* was denied by this court in the latter case (296 U. S. 645).

## JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed and reversed was entered on October 7, 1941 (R. 153), and the order denying the petition for a rehearing was entered on January 12, 1942 (R. 183).

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, c. 229, Section 1, 43 Stat. 938 (Title 28, U. S. Code, Section 347).

## STATUTE INVOLVED

The case involves the meaning and application of Section 11233 of the Ohio General Code, which reads in part as follows:

> "**Saving in case of reversal, etc.**—In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date, * * *."

## THE QUESTIONS PRESENTED

1. The insurance policy in question contains the following customary provision:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Under the settled law of Ohio, as announced by its highest court, the foregoing provision is held to be valid and enforceable, barring any suit not brought within the time specified. May the Circuit Court of Appeals, review-

ing a judgment of the District Court, sitting in Ohio where the cause of action arose, refuse to follow the law as established on this question by the Ohio Supreme Court?

2. Where the courts of Ohio, including its Supreme Court, have construed and applied a statute of the state (Sec. 11233 of the General Code), may the Circuit Court of Appeals in reviewing the judgment of the District Court, sitting in Ohio where the cause of action arose, ignore and refuse to follow the construction and application of such an Ohio statute as settled and established by the Ohio courts?

3. Where an action at law to recover on a policy of fire insurance has been fully tried **upon the merits** and determined adversely to the claims of the plaintiff, may the same claim between the same parties be relitigated in a suit in equity to reform the policy, as against a plea of *res adjudicata*, particularly where under the settled law of the State of Ohio all issues raised in the second suit **might** or **could** have been adjudicated in the first action?

4. Where a party has filed and prosecuted an action at law to recover on a policy of insurance to final judgment in the Federal District Court, which judgment has in all respects been affirmed by the Circuit Court of Appeals and *certiorari* denied by the Supreme Court of the United States, to the large expense and detriment of the other party,—may such party, as against a plea of estoppel by election of remedies, begin and prosecute a new action, more than five years after the fire, to reform such policy and recover on the policy as reformed?

## REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI

The decision of the Circuit Court of Appeals, reversing the judgment of the District Court in favor of petitioner, is directly and clearly in conflict with the decisions of the

Supreme Court of Ohio on matters of local law; and is, therefore, in conflict, likewise, with the doctrine announced by this court in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, and *West vs. A. T. & T. Co.*, 311 U. S. 223, and like decisions. In particular:

1. In holding that the present suit in equity to reform the policy of insurance and to recover on the same as reformed is not barred by the twelve months' limitation contained in the policy, the Circuit Court of Appeals has taken a position directly and irreconcilably in conflict with the decisions of the Supreme Court of Ohio in *Appel vs. Cooper Insurance Co.*, 76 O. S. 52; 80 N. E. 955, and in *Bartley vs. National Business Men's Association*, 109 O. S. 585; 143 N. E. 386, and has produced confusion in the Ohio law which had heretofore been clearly established by the Supreme Court of the State of Ohio.

2. In holding that **Section 11233 of the General Code** of Ohio saved and preserved, as against the limitation of twelve months contained in the policy, this action filed nearly six years after the fire, the Circuit Court of Appeals has adopted a construction of this statute directly contrary to its plain language, and in clear conflict with the construction and application given it by the Ohio decisions. Thereby, confusion has been introduced into the Ohio law with respect to a purely local, remedial statute.

(a) The first or prior action at law was tried and finally determined **on its merits in favor of the defendant** (not in favor of the plaintiff or otherwise than on its merits). Section 11233 of the General Code, therefore, could not apply or help out plaintiff-respondent as to the present action.

Siegfried vs. Railroad Co., 50 O. S. 294, 296; 34 N. E. 331.

Frost vs. Blatz, 23 O. App. 40; 155 N. E. 158.

25 O. Jur. 580, Section 235.

(b) The court below held that the present suit to reform the policy **is not the same cause of action** as the prior action to recover on the policy as written (R. 160). General Code, Section 11233, therefore, **cannot** apply, because it saves the second or subsequent suit **only** when it is based upon the **same cause of action** as that determined in a prior suit otherwise than upon its merits.

Larwill vs. Burke, 19 O. C. C. 449, 472; affirmed 66 O. S. 683; 65 N. E. 1130.

Piscopo, Admr. vs. Railway Co., 19 O. C. C. (N. S.) 298.

Price vs. Kobacker Furniture Co., 25 O. App. 44, 47; 158 N. E. 551.

Brown vs. Erie Railroad Co. (6th Cir.), 176 Fed. 544.

25 O. Jur. 580, Section 235.

(c) **Section 11233, General Code,** does not apply to a contractual limitation, like the one here involved, voluntarily entered into by the parties. It applies only to statutory limitations.

Prudential Insurance Co. vs. Howle, 19 O. C. C. 621; 10 Ohio Cir. Dec. 290.

Riddlesbarger vs. Hartford Insurance Co., 74 U. S. (Wall.) 386; 19 L. Ed. 259.

23 A. L. R. 98.

*Contra, Cortesi vs. Firemen's Fund Insurance Co.,* 5 O. App. 109; 27 Ohio Cir. Dec. 100, decided by a divided court.

3. In refusing to affirm the decision of the District Court holding that respondent was barred of any recovery by the principle of *res adjudicata,* the Circuit Court of Appeals refused to follow the well settled law of Ohio to the effect that all issues which **might** or **could** have been ad-

judicated between the same parties in a former suit are *res adjudicata* in a subsequent suit based upon the same claim for relief. *Covington & Cincinnati Bridge Co. vs. Sargent*, 27 O. S. 233. *Strangward vs. Amer. Brass Bedstead Co.*, 82 O. S. 121; 91 N. E. 988. *Clark vs. Baranowski*, 111 O. S. 436, 440; 145 N. E. 760. *Bolles vs. Toledo Trust Co.*, 136 O. S. 517, 520; 27 N. E. 2d 145.

In this respect the decision of the Circuit Court of Appeals is likewise in conflict with the decisions of this court in *Baltimore Steamship Co. vs. Phillips*, 274 U. S. 316; 71 L. Ed. 1069, and in *Chicot County Drainage District vs. Baxter State Bank*, 308 U. S. 371; 84 L. Ed. 277.

4. The decision of the Circuit Court of Appeals, in holding that respondent was not estopped from a recovery as prayed for in the present suit by his election of remedies in prosecuting, to the prejudice of the petitioner, his former action at law to final adverse judgment in the District Court, the Circuit Court of Appeals for the Sixth Circuit, and to the Supreme Court of the United States on *certiorari*, is in conflict with decisions of this court, including *Warner vs. Godfrey*, 186 U. S. 365; 46 L. Ed. 1203, and the general law relating to estoppel by election of remedies. See also the following:

Healey Ice Mach. Co. vs. Green, 184 Fed. 515, 520.

Steinbach vs. Relief Fire Insurance Co., 12 Hun. (N. Y.) 640; affirmed 77 N. Y. 498.

Leaksville Light & Power Co. vs. Georgia Casualty Co., 193 N. C. 618; 137 S. E. 817, 818.

Thomas vs. United Firemen's Insurance Co., 108 Ill. App. 278, 281.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this Honorable Court, di-

rected to the United States Circuit Court of Appeals, for the Sixth Circuit, commanding that court to certify and to send to this court for review a full and complete transcript of the record and of the proceedings in Case No. 8640, entitled on its docket "*Martin Leithauser, as Administrator of the Estate of P. J. Leithauser, deceased, Appellant vs. Hartford Fire Insurance Company, Appellee,*" and that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

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